Nos. 87-1589 and 87-1888

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
*PETITIONER,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
*RESPONDENT.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF FOR THE REGIONAL RAILROADS OF AMERICA and THE AMERICAN SHORT LINE RAILROAD ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## BRIEF FOR THE REGIONAL RAILROADS OF AMERICA and THE AMERICAN SHORT LINE RAILROAD ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

This brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

## INTEREST OF AMICI CURIAE

The 1980's witnessed a dramatic growth in the number of regional and local railroads: 190 local and regional railroads were created between 1980 and 1987,[1] as compared with only 75 during the previous three decades.[2] Since the first decision in the cases at bar, however, the formation of these railroads has virtually

[1] Economics and Finance Department, Association of American Railroads, Statistics of Regional and Local Railroads 60 (1988).

[2] Statistics of Regional and Local Railroads, *supra* n.1, at 129-290.

ceased. The Regional Railroads of America ("RRA") is comprised of 80 members, which, when taken together, own the majority of track miles and employ the majority of employees associated with the 190 companies formed since 1980.[3] RRA's members are predominantly companies that have been formed since 1980; however, RRA also includes several railroads formed in the 19th century which operate under the full panoply of restrictive labor agreements and working conditions that prevail throughout the Class I railroad industry.[4] The American Short Line Railroad Association ("ASLRA") represents 330 local railroads. Although ASLRA's members are the smallest of the railroads in the industry, having only six percent of the industry's total employees and 10 percent of its total route mileage, these railroads are by far the most numerous, constituting well over 80 percent of the total industry population. Both RRA and ASLRA are concerned that the cessation of the creation of these new businesses will jeopardize, if not destroy, the economic progress the rail industry has experienced since 1980.

Regional railroads, particularly, are an economic response to the fundamental and long-term changes in the railroad industry which were initiated by the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). That response has preserved jobs and service and has spurred investment into an industry that only ten years ago was on the verge of financial collapse. Like almost all free market initiatives, the response has worked because it makes economic sense. These new companies are showing tremendous growth potential, and that growth is resulting in numerous and more stable jobs, as well as the continued provision of rail service to communities that otherwise would have lost rail service entirely.

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[3] The 190 carriers together own 18,327 miles of rail line and employ 6,208 employees. Statistics of Regional and Local Railroads, *supra* n.1, at 60.

[4] In 1987, Class I railroads were defined as those railroads which earned in excess of $87.9 million in operating revenue per year. Statistics of Regional and Local Railroads, *supra* n.1, at Definitions.



Rail labor wants to impose on these new businesses the same unique and costly work rules and labor protective benefits it has enjoyed on the large Class I railroads. Without the constraints of the Class I labor contracts or labor protective provisions, however, regional and local railroad management and labor have been free to be creative in their approach to the problems that face the industry. For instance, through management and labor cooperation, these carriers have established pay rates for employees who operate trains on the basis of the number of hours the employees work in a day. Although this structure is not unusual in most industries, the principle of eight hours pay for eight hours work represents a significant change in the industry, as many, if not all, the large railroads pay their operating employees on the basis of the number of miles they travel in a day, *i.e.*, employees are paid a full day's wages for every 108 miles they travel.

Because regional railroads largely are a new phenomenon, and because the continued formation of new railroads is largely dependent on the outcome of these cases, RRA and ASLRA respectfully submit that an understanding of the role these companies play in the industry and its restructuring effort is relevant to the Court's decision in these cases. Thus, RRA and ASLRA respectfully submit this Brief to explain why this Court must adopt the arguments of The Pittsburgh & Lake Erie Railroad Company ("P&LE") and reverse the decisions below. Affirming the lower court would have a devastating, perhaps irreparable, impact on the industry.

## SUMMARY OF ARGUMENT

Congress in enacting the Staggers Rail Act of 1980 ("Staggers") directed the Interstate Commerce Commission ("ICC") to reduce or eliminate the regulatory burdens on the rail industry. In response to Congress's directive, the ICC has formulated its own policies with respect to line sale transactions to new carriers. Since 1986, it has been the Commission's practice to allow line sales to new carriers to proceed without extensive regulatory oversight or

the automatic imposition of labor protective conditions. The rail industry has responded favorably to these policies and, as a result, many communities and shippers have benefitted from continued, and, in most instances, improved rail transportation services.

Among its duties under the Interstate Commerce Act ("Act"), the ICC retains the power to evaluate the policy implications and public interest impact of line sale transactions and to take such actions as are consistent with established policy goals and the public's interest. During its review of a line sale transaction, the ICC is to weigh and balance the competing interests involved to reach a result which is fair and equitable to all interests concerned.

Often, after its review of these transactions, the ICC concludes that it is not in the public interest to impose upon either the selling or the acquiring companies expensive and burdensome labor protective conditions. Those decisions are based, in part, on the fact that the imposition of such conditions would impede the sale processes and would thwart the implementation of rail policy goals. It also is the ICC's belief that these sales are in labor's long-term best interest.

Without these sales, the industry and the public will experience severe consequences. Class I carriers will be forced to abandon unprofitable lines, depriving the communities and shippers they serve of rail service. These abandonments not only will disrupt the economies of the rail industry and these communities, but they also will affect rail labor as employment drops in response to the decreases in rail service. RRA and ASLRA respectfully contend that Congress recognized the public good of line sale transactions and directed the ICC to encourage actions which would lead to the revitalization of the rail industry. Affirming the appellate decisions in the cases under review would allow rail labor to impede these sales, and, thus, would directly conflict with Congress's desire and intent.



## ARGUMENT

### THROUGH THE ENACTMENT AND IMPLEMENTATION OF THE STAGGERS RAIL ACT OF 1980, CONGRESS AND THE ICC REVITALIZED THE RAIL INDUSTRY FOR THE BENEFIT OF ALL INTERESTS CONCERNED.

#### A. The Creation of Regional and Local Railroads Is Totally Consistent With the Purpose Of and Intent Behind the Staggers Rail Act of 1980.

RRA and ASLRA agree with P&LE's position that the ICC has exclusive and plenary jurisdiction to regulate the sale of rail lines and to balance and protect the various interests involved in a rail line sale. In its exercise of authority with respect to line sales, the ICC has lifted certain regulatory burdens on the rail industry to promote an efficient and viable transportation system. Through its filings, P&LE has described the effect of the ICC's actions from the perspective of a carrier seeking to *sell* rail lines. RRA and ASLRA respectfully submit the following to explain the perspective of companies that have acquired or that seek to acquire rail lines under the ICC's expedited acquisition procedures.

Congress, in Section 10101a of the Act , 49 U.S.C. § 10101a, set forth the policy considerations which govern the ICC's regulation of the rail industry. To achieve the goals established by Congress, the ICC's regulation of carrier actions is to be effected, *inter alia*, in a manner:

> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes to meet the needs of the public and the national defense;
>
> • • •
>
> (12) to encourage fair wages and safe and suitable working conditions in the railroad industry. . . .

49 U.S.C. § 10101a(2), (3), (4), (12).

When Congress enacted these goals, it correctly perceived that the financial and physical conditions of the rail industry were in severe decline and that the industry's prospects for recovery were poor in light of the railroads' competitive disadvantage against less regulated transportation industries, such as trucks and barges. *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 34-79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978-4024. To revitalize the industry, Congress concluded that regulatory burdens on the industry should be reduced or eliminated. As a result, Congress directed the ICC, through the enactment of Staggers, to ease the burdens on rail carriers. *See Coal Exporters Ass'n v. United States*, 745 F.2d 76, 80-81 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985).

After the enactment of Staggers, the ICC carried out Congress's instructions by handling requests for an exemption from regulatory requirements on an individual, case-by-case basis, *i.e.*, when a company that was not yet a carrier proposed to acquire a line, that buyer would petition the ICC for an exemption from the regulatory requirements of Section 10901 of the Act, 49 U.S.C. § 10901, with respect to that acquisition only. For the most part, those petitions were routinely granted and were not conditioned upon the acceptance of labor protective conditions by either the selling or the acquiring companies. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810, 811, 813 (1986), *aff'd sub nom.*, *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).



In 1986, the ICC recognized that its case-by-case review of these exemption requests delayed the sale processes to the detriment of the petitioning railroads without any attendant benefit to the public. *Id.* at 811. It also determined that the automatic imposition of labor protective conditions in connection with the sale of rail lines to new carriers was inconsistent with congressional and ICC policy. *Id.* at 814-15.[5] According to the ICC:

> By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be en-

[5] Under the terms of the labor protective conditions the ICC imposes in sale transactions between two carriers, employees adversely affected by such sales would be eligible for, among other things: a guarantee of their compensation for up to six years; relocation allowances and reimbursement for the loss associated with the sale of their homes or the termination of their residential leases; and retraining benefits. Furthermore, the purchasing railroad could be required to preserve the selling railroad's employees' contracts until those contracts are modified by agreement or by applicable statute. *New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90, *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). No other industry, to RRA's and ASLRA's knowledge, is statutorily compelled to provide such benefits to its employees without government assistance.

couraged and allowed to proceed with a minimum of regulatory cost and delay.

*FRVR Corporation -- Exemption Acquisition and Operation -- Certain Lines of Chicago and North Western Transportation Co.*, Finance Docket No. 31205, served January 29, 1988 ("*FRVR*") at 2 (footnotes omitted). Due to the policy it adopted in 1986, the Commission found that "[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." *Id.* at 2-3 (footnote omitted). The ICC's findings concerning the impact of its policy on the rail industry are consistent with information collected by RRA and ASLRA.

Prior to 1980, rail carriers that wished to exit from a marginal or unprofitable market did so by abandoning service over their lines in that market. *Id.* at 1. Once a line became a candidate for abandonment, the course generally followed by the railroads was to reduce the frequency of trains and to reduce maintenance expenses over the line, actions which resulted in inferior service. Inferior service led the customers to search for and to utilize other modes of transportation. The end result of this process was that the carriers lost revenues, the communities lost service and the employees lost their positions and/or were relocated.

Currently, there are thousands of miles of rail line that are potential candidates for abandonment. A 1988 internal survey of Class I railroads conducted by consultants for RRA identified over 17,000 miles of Class I track that are marginal or unprofitable light density lines that, RRA and ASLRA respectfully submit, inevitably will move from sale candidates to abandonment candidates if this Court does not reverse the decisions under review . In fact, there is evidence that the trend toward abandonment (and away from sales) has already begun.

Between 1982 and 1987, the number of abandoned miles of track declined, with the lowest level being reached in Fiscal Year 1987 when 818 miles were taken out of service.[6] Since the is-

[6] Fiscal Year 1988 ICC Ann. Rep. (Draft).



suance of the first appellate decision in the cases under review, the number of miles for which carriers have sought abandonment authority has steadily increased. For Fiscal Year 1988, 1,293 miles of rail lines were abandoned, a 58 percent increase over the previous year.[7] Data available at the ICC for the first months of Fiscal Year 1989 show that upward trend continuing.[8]

Rather than witness the continuing trend of abandonments of service that had been taking place in the 1970's, Congress in 1980 acted to preserve service by deregulating the rail industry. Deregulation created the potential for many of these marginal lines to be viable, for Staggers allowed these lines to be sold to operators who were allowed to do what the rest of America's businesses are allowed to do, *i.e.*, match costs with revenues.

Recognizing the problems associated with abandonments and the potential public good of line sales, the ICC, in accordance with the directives of Congress, concluded that lines sales should proceed without burdensome regulatory oversight or ICC-imposed labor protection costs. *FRVR* at 1-2; *Northwestern Pacific Acquiring Corp. and Eureka Southern Ry. -- Exemption From 49 U.S.C. 10901 and 11301*, Finance Docket No. 30555, served January 8, 1988 ("*NWP*") at 3-6. These ICC actions convinced entrepreneurs that many marginal rail lines were worth purchasing, and the marketplace responded with the necessary financing. The result has been positive: the influx of 190 new carriers since 1980.

ICC flexibility in dealing with these start-up businesses is critical when one considers how a new railroad begins its operations. Normally, it starts with a relatively light density traffic base, which was the very reason the Class I railroad desired to rid itself of the asset in the first place. The new owner usually encounters costly rehabilitation requirements because, due to the light traffic density, the selling railroad had minimized capital improvements and maintenance expenditures over the line for years before the

[7] Fiscal Year 1988 ICC Ann. Rep. (Draft).

[8] This information was obtained in discussions with officials at the ICC's Office of Proceedings on preliminary data for Fiscal Year 1989.

sale. Furthermore, the new company must generate a substantial cash flow to service its debt, which is typically high in relation to its equity.

Despite their start-up problems, the new, locally-based railroads represent what is most admirable about America's free enterprise system. They are managed by enthusiastic entrepreneurs who are betting they can turn money-losing lines into money-making lines. They are financed by institutions that are willing to undertake a high degree of risk, and, RRA and ASLRA respectfully submit, they are frequently operated by employees who understand that productivity can lead to profitability and job security.

By preserving irreplaceable railroad facilities, these new railroads sustain service to thousands of local communities. Because local railroads can offer more efficient service and are in closer touch with their shippers than Class I carriers, service has improved. *See FRVR* at 1-3. Furthermore, these carriers benefit the national railroad system by feeding traffic from light density lines to the mainline system, instead of having the traffic diverted to motor carriers. *Id.* at 1.

To provide an up-to-date assessment of the progress of these new railroads, both in their own right and in comparison to RRA's pre-1980 members, RRA surveyed its members. A random sample of 47 percent of RRA members responded in time for this filing.

The survey illustrates the new companies' growth potential. On average, their carloads and revenues have increased by 6.7 and 9.2 percent, respectively, from their first year of operation through 1988. This contrasts to an average annual decline of carloads of 0.33 percent and an average annual revenue increase of only 0.47 for the Class I railroad industry as a whole during the period 1980-1988.[9] Even more striking is the comparison to the pre-1980 regional railroads that are subject to national pattern labor agree-

[9] Association of American Railroads, Railroad Ten-Year Trends, 1978-1987 (1988); Association of American Railroads, Quarterly Reports of Revenue, Expenses and Income of Class I Railroads (1988).



ments. In contrast to the new regionals' growth, these pre-1980 regional carriers had decreases in carloads and revenues of 5.6 and 0.35 percent, respectively.

Expenditures by the new companies for maintenance of facilities and equipment have likewise increased at an average annual rate of 10.7 percent. These improvements will result in improved and more efficient service to shippers, thus increasing the new railroads' ability to compete with trucks. As a comparison, the pre-1980 regionals responding to the survey had decreased their overall maintenance expenditures by an average of 0.55 percent per year from 1980 through 1988.

The results of the survey also reflect the growth in employment opportunities on the regional railroads in the 1980's. In the sample, 85 percent of the new regionals employed as many or more people at the end of 1988 as they did on their first day of operation. On an aggregated basis, employment has increased on the new regionals by an average of 4.8 percent per year. In contrast, the workforce of the pre-1980 regionals surveyed declined by 57 percent from 1980 to 1988, while employment in the Class I railroad industry declined from 458,300 to 235,750, a decrease of 48.6 percent.[10]

The weighted average annual wages of the new regionals' employees for 1988 are more than $22,348. Thus, the wages of employees on the new regionals compare favorably to the estimated average 1988 average wage level of $21,357 for employees in all industries, as reported by the Bureau of Labor Statistics.[11]

Finally, almost 70 percent of the new regional railroad companies participating in the survey had or were developing a profit-sharing plan for their employees. Some 62 percent had already made one or more annual profit-sharing payments.

[10] Interstate Commerce Commission, Monthly Statement, M-350, Report of Railroad Employment — Class I Line Haul Railroads (1988).

[11] Bureau of Labor Statistics, U.S. Department of Labor, Average Annual Pay by State and Industry, 1986 (September 1, 1987). These figures have been adjusted to estimate 1988 wage levels.

As the survey shows, regional and local railroads are a dynamic and growing portion of the rail industry. Stopping the formation of regional and local railroads may, over the short term, preserve some jobs, but over the long-term, the large railroads will not be able to maintain artificially high employment levels. Economic forces eventually will require a solution to the problem; delay, however, will exact a great toll for while these forces are working, tens of thousands of miles of track will be deteriorating to a point where they will have no value to the owner, to a buyer, to communities or to the employees.

### B. In Evaluating All Interests in Line Sale Transactions, the ICC Properly Has Determined that All Interests, Including Labor, Benefit if the ICC Does Not Burden New Operators With Inefficient, Expensive Labor Protective Conditions.

The ICC, as part of its exclusive and plenary jurisdiction over the railroad industry, possesses the authority to decide whether labor protective provisions should be imposed as a condition to certain transactions it authorizes. *United States v. Lowden*, 308 U.S. 225, 238 (1939). In accordance with this authority, the ICC has formulated different types of labor protective provisions to address the issues involved in the various transactions it reviews. Under Section 10901 of the Act, 49 U.S.C. § 10901, the statutory section pursuant to which a non-carrier must apply in order to acquire a rail line, the ICC possesses the discretionary authority to impose labor protective conditions on the selling entity, the acquiring entity, or both. 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. United States*, 811 F.2d 1327, 1329 (9th Cir. 1987); *Black v. ICC*, 762 F.2d 106, 111 (D.C. Cir. 1985). In such transactions, rail labor ordinarily requests the ICC to impose labor protective conditions of the type the industry commonly refers to as "the *New York Dock* conditions."

When the ICC reviews a sale transaction between two rail carriers under Sections 11343, *et seq.*, of the Act, 49 U.S.C. §§ 11343, *et seq.*, the ICC is obligated pursuant to Section 11347 of the Act, 49 U.S.C. § 11347, to impose labor protective conditions



in connection with its authorization of the transaction. Interpreting its Section 11347 duties, the ICC promulgated in *New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), a comprehensive package of protective benefits for employees affected by certain transactions effected under Section 11343 of the Act, 49 U.S.C. § 11343. These conditions provide numerous economic benefits for employees adversely affected by control, merger or purchase transactions. *See* n. 5, *supra*.

In addition to these benefits, the *New York Dock* conditions can have the effect of requiring the purchasing carrier to assume the terms of the seller's pre-existing labor agreements:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

*New York Dock Ry.*, 360 I.C.C. at 84, App. III, Art. I, § 2.

The ICC's disinclination toward imposing such onerous obligations in connection with line sales to new carriers, RRA and ASLRA respectfully submit, is due in part to its recognition that such burdens in line sale transactions are not in the public interest, and are ultimately not in labor's best interest. Discussing at length its rationale for not imposing labor protective conditions in connection with line sales to new entities, the ICC has explained:

> We found that, although the imposition of labor conditions would tend to encourage fair wages and safe and suitable working conditions in the industry, it would also burden the selling carrier and frustrate the statutory mandate to foster sound economic conditions in transportation. We further found that the imposition of labor conditions might thwart the development and

continuation of a sound rail transportation system by discouraging the sale of marginal rail facilities.

• • •

The benefits of this policy were clear. Shippers would receive enhanced service by a more dependent and dependable local entity, communities would retain rail service, the long-haul railroads would retain traffic and at the same time be relieved from operating these lines, and, in both the long and short run, more rail jobs would be retained and could even expand with the fortunes of the new shortline carriers.

• • •

A review of the rail transportation policy of Section 10101a suggests that, on balance, more policies would be furthered by not imposing labor protection on [the seller]. Under the circumstances here, the imposition of labor protection would (1) raise barriers to entry and exit (49 U.S.C. 10101a(7)); (2) discourage the continuation of rail service (49 U.S.C. 10101a(4)); and (3) impede new carrier efforts to earn adequate revenues (49 U.S.C. 10101a(3) and (5)).

*NWP* at 3, 4, 14.

The ICC's practice of not imposing "successor" obligations on a new business entering the rail industry is consistent with a decision of the United States Court of Appeals for the Seventh Circuit, one of the few courts to address the successorship issue in the Railway Labor Act context. Rejecting labor's arguments, that court concluded that non-carriers which acquired rail lines from the former Chicago, Milwaukee, St. Paul & Pacific Railroad Company should not be successor employers. *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 658 F.2d 1149, 1174 (7th Cir. 1981), *cert. denied sub nom., Railway Labor Executives' Ass'n v. Ogilvie*, 455 U.S. 1000 (1982) ("*MILW*"). According to the Seventh Circuit, its decision was supported by the following principles underlying the decision in *National Labor Relations Board v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), a leading case on successorship



issues in the National Labor Relations Act framework: (1) freedom of contract under federal labor law; (2) inhibition of the free flow of capital if the new employers were to be bound to the pre-existing agreements; and (3) freedom of the successor to effect substantial alterations in the operations of the enterprise. *MILW*, 658 F.2d at 1175. The Seventh Circuit further concluded that when Congress desires to bind successors to the bargaining obligations of predecessor employers, it evidences its intent to do so in a statute (*e.g.*, 45 U.S.C. §§ 565, 772(b), 774(a)).[12] *Id.* Section 10901 and its legislative history contain no evidence of such intent.

Regional and local carriers must be free to work with labor to fashion solutions on an individual business basis. Contractual terms that are acceptable for a large Class I carrier may be disastrous for a small carrier. For example, Class I railroads often are required to operate their trains with 4-5 man crews. Regional and local railroads can, and do, provide better service to their customers than the Class I carriers they replaced; yet, they are able to do so with only 2-3 man crews. If the regional and local railroads were forced to run their trains with 4-5 man crews, the cost of their operations would, in many cases, exceed their revenues.

To turn a marginal or money-losing line into a successful operation, regional and local carriers have had to improve service and search for new customers. In order to be responsive to their customers' needs, regional and local railroads have had to establish competitive service schedules and prices for their services; however, if their labor costs and work rules are dictated to them before they even begin to operate, the regional and local carriers lose their ability to respond to the market.

The fact that regional and local carriers do not generally adopt the Class I railroad labor contracts does not mean that the regional and local railroads do not work with labor to create attractive, yet affordable, compensation packages. Of the new regional railroads participating in the survey referenced at page

12 These statutory sections provided specifically for the assumption of collective bargaining agreements.

10, *supra*, 88 percent of their employees were unionized and, thus, these carriers had negotiated with unions the rates of pay and work rules which governed their employees' employment relationship. Furthermore, almost 70 percent had implemented profit-sharing plans for their employees so that the employees could share in the proceeds that were generated by the productivity improvements these carriers have made.

RRA and ASLRA respectfully contend that Congress and the ICC recognized the inherent benefits in allowing new carriers to acquire and operate lines without the burdens of regulation and labor protection. Without the flexibility to determine their own fate, entrepreneurs will be dissuaded from creating regional and local rail carriers, and that result will directly, and negatively, have an impact on the fate of an industry which provides essential services to shippers and communities across the Nation.

## CONCLUSION

After eight years of watching the rail industry respond constructively to deregulation, RRA and ASLRA have witnessed a disturbing, destructive trend in the industry since the issuance of the first appellate decision in the cases under review. RRA and ASLRA fear that the recent increase in rail line abandonments represents a resurgence of the pre-Staggers solution to the problem of exiting from marginal or unprofitable markets, namely, the elimination of service. If the past is prologue, the industry and the communities and shippers it serves face significant financial problems if the trend is not reversed, for rail service and jobs will be lost permanently. Acceptance of P&LE's arguments in the cases before the Court, RRA and ASLRA respectfully submit, not



only would result in a correct decision on the merits, but it also would have a much needed positive impact on an industry which provides essential transportation services to communities across the Nation. Accordingly, RRA and ASLRA respectfully request that the Court grant P&LE's requests for relief.

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